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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1937

No. 746

ROBERT A. TAFT, EXECUTOR OF THE ESTATE OF ANNA S. TAFT, DECEASED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN SUPPORT OF PETITION

ROBERT A. TAFT,
Attorney for Petitioner.

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Cincinnati, Ohio.

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Your Petitioner, Robert A. Taft, as the Executor of the Estate of Anna S. Taft, Deceased, prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment of that Court in the above-entitled cause of action, and respectfully shows to this Honorable Court as follows:

Judgment Below

The judgment of the United States Circuit Court of Appeals for the Sixth Circuit was entered November 2, 1937 (R. p. 77), affirming the judgment of the United States Board of Tax Appeals, entered February 11, 1936 (R. p. 32).

STATEMENT OF CASE

Your Petitioner is Executor of the Estate of Anna S. Taft, who died on January 31, 1931, a resident of Cincinnati, Ohio. Your Petitioner, in filing the Federal Estate Tax Return for her estate, claimed as deductions for the purpose of determining the net estate, subject to estate tax under the Revenue Act of 1926, the amounts owing at her death on the following contractual obligations which she had entered into prior to her death:

	Amount Owed At Death
1. A contract with the University of Cincinnati to establish a fund at the University to be known as the "Charles Phelps Taft Memorial Fund"	$2,000,000.00
2. A contract with the Cincinnati Institute of Fine Arts to provide it with funds to employ two additional men in the Cincinnati Symphony Orchestra for the year 1930-31, if the Orchestra would employ such additional men	3,920.00
3. A contract with the Cincinnati Institute of Fine Arts to contribute $10,000.00 per annum towards the salary of a director of art for the Institute if the Institute would employ such director	10,000.00
4. A contract with the University of Cincinnati to provide it with funds to pay the salary of Thomas Kelly if the University would employ Kelly as a professor to give a course in musical appreciation	1,500.00
Total	$2,015,420.00

The Commissioner of Internal Revenue disallowed these obligations as deductions, and both the Board of Tax Appeals and the United States Circuit Court for the Sixth Circuit affirmed the disallowance.

The facts concerning the entering into of these obligations are as follows:

1. The Contract with the University of Cincinnati to Establish Charles Phelps Taft Memorial Fund.

On May 3, 1930, Mrs. Taft addressed a letter to the Board of Directors of the University of Cincinnati (Stip. 28, R. pages 45-47) offering to establish a fund in memory of her husband, to be known as the Charles Phelps Taft Memorial Fund to be used to assist, maintain and endow the study and teaching of "The Humanities" in the University of Cincinnati. In this letter she stated that she would make available to certain Trustees for the University the sum of $50,000.00 during the ensuing year, the sum of $75,000.00 during the following year, and the sum of $100,000.00 in each year thereafter, or such other income as might be derived from a fund of $2,000,000.00, which she would ultimately arrange to transfer to such Trustees; that pending the complete transfer of the principal of this fund, she would guarantee all obligations which the Trustees might assume within the foregoing limitations, and that no expenditures should be made by the Trustees except in accordance with the approval of the Board of Directors of the University.

This offer was formally accepted by the Board of Directors of the University of Cincinnati by resolution adopted May 6, 1930 (Stip. Exhibit O, R. pp. 63, 64).

In accordance with this agreement, Mrs. Taft paid to the Trustees named in her letter, on September 30, 1930, the sum of $50,000.00 (R. p. 50). On December 10, 1930, the Trustees appropriated $33,800.00, subject to the approval of the Board of Directors of the University (Stip. Exhibit O, R. pp. 65-71). On January 6, 1931, the Board of Directors of the University approved the expenditures recommended by the Trustees (Stip. Exhibit P, R. pp. 71, 72). Prior to January 31, 1931, the date of Mrs. Taft's death, the books of the University

showed expenditures out of said appropriation amounting to $11,753.83 (R. p. 54, top).

Since Mrs. Taft's death, your Petitioner as Executor of her estate, up to the time of the hearing before the Board of Tax Appeals, had paid to the Trustees the total sum of $249,750.00, as interest on the principal of the fund, such interest being calculated at five per cent during the first few years, and three and one-half per cent during the latter years (R. p. 50).

The University is a municipal university under the laws of the State of Ohio, owned by the City of Cincinnati, governed by a Board of Directors appointed by the Mayor of the City, and without separate corporate existence from the City. Its work is purely educational, and no profit inures to any individual (Stip. Sec. 27, R. p. 45).

2. The Contract with The Cincinnati Institute of Fine Arts to Provide it with Funds to Employ Two Additional Men in the Cincinnati Symphony Orchestra.

The Cincinnati Institute of Fine Arts is a charitable corporation under the laws of Ohio, organized for the purpose of maintaining a symphony orchestra, music schools and art museums, and no profit inures to any individual. Mrs. Taft and her husband, Charles P. Taft, by deed of gift dated May 21, 1927, conveyed to it their house and collection of pictures and other works of art in the house, together with the sum of $1,000,000.00. This deed of gift was conditioned on the citizens of Cincinnati contributing a fund of $2,500,000.00 to the Institute to be used primarily for the support of the Cincinnati Symphony Orchestra, to which Mrs. Taft had theretofore contributed as much as $200,000.00 per year (Stip. 19, R. p. 44, Exhibit I, the original of which is filed with the record in case No. 7545 in the United States Circuit Court of Appeals, and by stipulation is made part of this record R. pp. 48-54). The campaign was successful and the Institute took over the operation of the orchestra for the orchestra year

1929-30. The Institute found that it would be necessary to reduce the size of the orchestra, as it did not have sufficient income to operate it. The director of the orchestra desired to retain two more men than the Institute would allow. Thereupon Mrs. Taft promised that if the Institute would retain two men, whom the director desired retained, she would pay to the Institute the amount of their salaries for the two years covered by the contracts of employment then being made. Relying on this promise, the Institute re-engaged these two men. Mrs. Taft paid the Institute $3,920.00 prior to her death, the amount of their salaries for the first year, and your Petitioner, as her Executor, paid the same amount to the Institute after her death to provide funds to pay their salaries for the second year (R. p. 48). The Institute would not have re-employed these men except for Mrs. Taft's agreement to pay the amount of their salaries (R. p. 52).

3. The Contract with The Cincinnati Institute of Fine Arts to Contribute $10,000.00 per annum towards the Salary of a Director of Art for the Institute.

On June 3, 1929, Mrs. Taft addressed a letter to the Institute stating that if it would employ a director of art, she would contribute $10,000.00 per annum towards his salary (Stip. 22, R. p. 44). Relying on this letter, the Institute engaged Mr. Walter H. Siple, then Assistant Director of the Fogg Art Museum in Cambridge, Massachusetts, at a salary of $10,000.00 per year. The Institute did not have sufficient funds to employ a director at such salary, and would not have done so except for Mrs. Taft's agreement (R. p. 53). The only connection the Institute had with art at that time was the Taft Collection in Mrs. Taft's residence, over which she retained control during her life, under the deed of gift of May 21, 1927. As a part of Mr. Siple's duties was to act as Curator of this collection, Mrs. Taft, by his employment, secured

his services to take care of this art collection during the time the collection remained in her possession (R. p. 53). Mrs. Taft paid this sum to the Institute for one and one-half years prior to her death, and your Petitioner, as her Executor, paid this sum for one year after her death (R. p. 49).

4. The Contract with University of Cincinnati to Provide Funds to Pay the Salary of Mr. Thomas James Kelly.

In the Spring of 1930 Mrs. Taft agreed with the University of Cincinnati that if it would engage Mr. Thomas James Kelly as a professor to give a course in musical appreciation during the academic year 1930-31, she would pay to the University the amount of his salary. She had made similar arrangements for some years prior to that time. The University employed Mr. Kelly, but would have not done so, except for her agreement to pay to the University the amount of his salary (R. p. 53). $1,500.00 was owed at the time of her death, which your Petitioner, as her Executor, has since paid to the University (R. p. 51).

STATUTES INVOLVED

The Statutes involved in this Petition are the following portions of Section 303(a) of the Revenue Act of 1926, in effect on January 31, 1931:

> "Sec. 303. For the purpose of the tax the value of the net estate shall be determined—
>
> "(a) In the case of a resident, by deducting from the value of the gross estate—
>
> "(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property * * * to the extent that such claims, mortgages, or indebtedness were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth,
>
> * * * * *

"(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual ..."

QUESTIONS INVOLVED

The questions presented by this Petition are as follows:

1. Whether a promise to pay a sum of money to a corporation organized for charitable and educational purposes, accepted by such corporation and legally binding on the promisor, is a claim incurred or contracted bona fide, and for an adequate and full consideration in money or money's worth within the meaning of Section 303(a) (1) of the Revenue Act of 1926, so that the amount due under such promise at the time of promisor's death is deductible from her gross estate in determining the net estate subject to estate tax under the Revenue Act of 1926.

2. Whether a promise to pay a sum of money to a corporation organized for charitable and educational purposes, accepted by such corporation and legally binding on the promisor, and in reliance upon which and in accordance with the terms of which promise, the charitable corporation incurs an obligation to pay an equivalent sum of money to a third party for services to be rendered by such third party, is a claim incurred for an adequate and full consideration in money or money's worth within the meaning of said Section 303(a) (1) of said Act, so that the amount due under such promise at the time of the promisor's death is deductible from her gross estate in

determining the net estate subject to estate tax under the Revenue Act of 1926.

3. Whether a promise to pay a sum of money to a corporation organized for charitable and educational purposes, accepted by such corporation and legally binding on the promisor, is a transfer to or for the use of a corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art, within the meaning of Section 303(a) (3) of the Revenue Act of 1926, at the time such promise is accepted by the corporation, so that the amount remaining due under such promise at the time of the promisor's death is deductible from the amount of her gross estate in determining her estate tax under the Revenue Act of 1926.

REASONS FOR GRANTING THE WRIT

(1) *The United States Circuit Courts of Appeal are in conflict on the question of allowing such obligations as deductions under Section 303(a) (1)*

The Circuit Court of Appeals for the Sixth Circuit, in affirming the United States Board of Tax Appeals and disallowing the foregoing deductions claimed by Petitioner under Section 303(a) (1) of the Revenue Act of 1926, has laid down a rule which is in conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit in *Turner v. Commissioner*, 85 Fed (2d) 919, and in *Commissioner v. Bryn Mawr Trust Company*, 87 Fed. (2d) 607. It is in agreement with the decisions of the United States Circuit Court of Appeals for the Eighth Circuit in *Glaser v. Commissioner*, 69 Fed. (2d) 254, (although that case may be disguished on its facts as there was no legally binding obligation) and the United States Circuit Court of Appeals for the Second Circuit in *Porter v. Commissioner*, 60 Fed. (2d) 673,

Bretzfelder v. Commissioner, 86 Fed. (2d) 713, and in *Lockwood v. McGowan, Collector of Internal Revenue*, 86 Fed. (2d) 1005. It is to be noted, however, that the Second Circuit actually allowed the deductions as transfers under Section 303(a) (3).

(2) *The United States Circuit Courts of Appeals are in conflict on the question of whether these contracts amounted to transfers under Section 303(a) (3).*

This decision of the Circuit Court of Appeals for the Sixth Circuit in disallowing these deductions as transfers under Section 303(a) (3), is also in conflict with the United States Circuit Court of Appeals for the Second Circuit in the *Porter, Bretzfelder* and *Lockwood Cases*, and with the United States Circuit Court of Appeals for the Third Circuit in the *Turner* and *Bryn Mawr Trust Company Cases.*

(3) *The questions are important ones under the estate tax laws and should be settled by the Supreme Court.*

The questions involved are of importance, for the reason that the question of the deductibility of pledges under either Section has never been passed on by this Court. In spite of the decisions in the Second and Third Circuits, the Commissioner of Internal Revenue continues to disallow, as deductions or as transfers, pledges of the character in question in this case. It is a very common occurrence for decedents to die leaving unpaid pledges. In most instances these pledges are not sufficiently large to justify appeals from their disallowance as deductions by the Commissioner of Internal Revenue, with the result that many estates are being forced to consent to the disallowance of similar deductions in spite of the decisions by the United States Circuit Courts of Appeal for the Second and Third Circuits.

The phrase "adequate consideration in money or money's worth," appears not only in this section of the Revenue Act but in many other sections. Its meaning should be settled by the Supreme Court.

WHEREFORE, it is respectfully submitted that this Petition for certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

One opinion was delivered by the United States Board of Tax Appeals and was written by John M. Sternhagen. It appears on page 20 of the record and is reported in 33 B.T.A. 671. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (Circuit Judges Hicks and Simons, and Nevin, District Judge, Judge Simons writing) was filed November 2, 1937, and appears at page 78 of the record. It is reported in 92 Fed. (2d) 667.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U.S.C.A. 347.

The judgment of the United States Circuit Court of Appeals was entered on November 2, 1937.

STATEMENT OF THE CASE

The essential facts of the case are stated in the petition for certiorari, page 3, to which reference is hereby made.

SPECIFICATION OF ERRORS

We submit that the Circuit Court of Appeals for the Sixth Circuit erred:

1. In failing to find and hold that Mrs. Taft's promises to pay the above-mentioned sums of money to the University of Cincinnati, and to the Cincinnati Institute of Fine Arts were for adequate and full consideration in money or money's worth within the meaning of Section 303(a) (1) of the Revenue Act

of 1926, and hence deductible as claims against her estate in determining the net estate subject to estate tax.

2. In failing to find and hold that Mrs. Taft's promises to transfer these sums of money to the above-mentioned charitable corporations were transfers to such charitable corporations within the meaning of Section 303 (a) (3) of the Revenue Act of 1926, at the time that the offers were accepted by the corporations, and hence that the amounts owed under such promises at the date of Mrs. Taft's death were deductible from her gross estate in determining the net estate subject to estate tax.

3. In failing to find and hold that as a matter of evidence the employment of Professor Kelly by the University of Cincinnati was in consideration of Mrs. Taft's promise to pay to the University the amount of his salary.

SUMMARY OF ARGUMENT

I. The sum of $2,000,000.00 owed to the University of Cincinnati to establish the Charles Phelps Taft Memorial Fund is deductible for estate tax purposes either as a claim against the estate or as a transfer.

A. This indebtedness is deductible as a claim against the estate under Section 303 (a) (1) of the Revenue Act of 1926.

1. That this indebtedness is a legally binding obligation of the estate under the laws of Ohio, and was incurred bona fide has not been challenged.

2. The indebtedness was incurred for an adequate and full consideration in money or money's worth within the meaning of Section 303 (a) (1).

B. The execution of this binding pledge was a transfer to a charitable corporation deductible under Section 303 (a) (3) of the Revenue Act of 1926.

II. Additional reasons why the other obligations are deductible as claims against the estate, not applicable to the indebtedness to the University for the Charles Phelps Taft Memorial Fund.

ARGUMENT

I

The sum of $2,000,000.00 owed to the University of Cincinnati to establish the Charles Phelps Taft Memorial Fund is deductible for estate tax purposes either as a claim against the estate or as a transfer.

A. This indebtedness is deductible as a claim against the estate under Section 303(a) (1).

1. *That this indebtedness is a legally binding obligation of the estate under the laws of Ohio, and was incurred bona fide has not been challenged.*

The United States Board of Tax Appeals, (R. p. 24) and the United States Circuit Court of Appeals agree that this promise to establish the Charles Phelps Taft Memorial Fund became a binding obligation on Mrs. Taft upon acceptance by the University, and the binding obligation of your Petitioner, as her Executor, upon her death, and that this obligation was entered into bona fide. The Circuit Court said in its opinion (R. p. 79): "That the obligations incurred by the decedent were enforcible under Ohio law, or that they were incurred in good faith, is not challenged."

We wish to emphasis the fact, however, that the Supreme Court of the State of Ohio goes farther than the courts of other states in holding pledges to charitable institutions binding on the pledgor. It not only holds that such pledges are binding if given in consideration of the promises of others, or if the pledges are relied upon by the charitable corporation

and part of the money spent, but in the cases of pledges to universities, the Supreme Court of Ohio holds that the accomplishment of the purposes for which pledge was made and the University was formed is sufficient consideration. *Irwin Administrator v. Lombard University*, 56 O.S. 9. The syllabus in this case reads as follows:

> "The consideration of a promissory note executed to an incorporated college is an accomplishment of the purposes for which it is incorporated and in whose aid the note is executed; and such consideration is sufficient."

It should also be pointed out that by Section 7916* of the General Code of Ohio, municipal universities in Ohio, of which the University of Cincinnati is one, are specifically authorized to accept trust funds like the Charles Phelps Taft Memorial Fund.

In effect the consideration is the assumption by the University of the obligation to expend the income of the fund for certain stated purposes.

The only question, therefore, is whether this obligation to establish the Charles Phelps Taft Memorial Fund was incurred "for an adequate and full consideration in money or money's worth."

2. *The Indebtedness was Incurred for an Adequate Consideration in Money or Money's Worth.*

Prior to the Revenue Act of 1924, there was no provision limiting the deductibility of claims by any requirement as to the kind or amount of consideration. In that Act, however, a provision was added in Section 303(a) (1) which is similar to the provision in the 1926 Act, except that the word "fair" was used instead of "adequate and full." The report of the Ways and Means Committee shows that this limitation was inserted in the 1924 Act to make it conform with Section 302(c), (d)

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*See Appendix.

and (e) of the Act with regard to transfers made for less than full consideration. *Wade v. Commission*, 21 B.T.A. 339 at 345.

The purpose of inserting this qualification both in this section of the Act and in other sections was to prevent tax avoidance. Before this provision was inserted, claims against an estate might be deducted whenever they were supported by any legal consideration, even though such claims had been deliberately created for the purpose of permitting a deduction. Thus in any State where a sealed instrument imported consideration, an agreement to transfer assets under seal would have been deductible. Similarly, a man might make a contract with his children to transfer property for much less than its real value, thus creating a claim by his children against the estate. Obviously this purpose could not apply to the deductibility of binding pledges made to political subdivisions for public purposes, or to religious, charitable, scientific, literary and educational corporations. Transfers to such corporations, whether made prior to death in contemplation of death, or by will, are expressly deductible under Section 303(a)(3). If a man wishes to make such a bequest and avoid the inheritance tax thereon, he is expressly authorized and encouraged to do so.

The attempt to apply Section 303(a) (1) to exclude charitable pledges has this strange effect. A man may transfer property before his death to such an organization, thereby decreasing the total amount of his estate, and avoiding any inheritance tax on property so transferred. He may leave such property in his will and the amount thereof is deducted before determining the inheritance tax. But according to the Government's claim, if he makes a promise to transfer such property before his death, which promise is legally binding under the laws of the State where he lives on his executor and is carried out by his executor, he would be required to pay an inheritance tax thereon. Surely no Congress would deliberately intend such a ridiculous result.

The important words of the section are really the words "bona fide," indicating an intention to disallow deductions arising from claims entered into in an attempt to avoid the estate tax. It is obvious that the purpose of the provision does not in any sense apply to charitable pledges which are legally binding under the laws of the State.

The same conclusion must be reached if we analyze the actual words used in this section. The phrase "adequate and full consideration in money or money's worth" is a redundant one. Webster's New International Dictionary, Second Edition, defines "adequate" as "legally sufficient; such as is lawfully and reasonably sufficient." One of the definitions of "full" is "adequate." It is also defined as "complete or not wanting in any part." The same dictionary defines "money's worth" as "something worth money; a fair or full equivalent for the money paid."

From these definitions, we submit that the phrase means little more than a substantial consideration not obviously inadequate. It would not be met by a seal, which, after all, is not consideration at all, but merely a substitute for consideration under the laws of some States. It would not be met by the vague phrase "in consideration of love and affection," because it is obvious that "love and affection" is not a consideration at all and has never been considered as such. It is also clear that if a man agrees to transfer a building worth $100,000.00 to his son for $5,000.00, the requirement of "adequate and full' consideration is not met. But we submit that when the consideration is the promise of other persons to contribute money, the promise of the university to undertake certain work, the agreement of an institution to employ men and do various other things which they would otherwise not do, there is no way in which the courts can question the adequateness or fullness of the consideration. Obviously the person making the pledge considered that the

consideration was sufficient for the amount he was agreeing to give. Thus in the present case it is clear that the employment of additional professors, the purchase of additional books, the granting of aid to worthy students by the University of Cincinnati for all time to come was considered by Mrs. Taft to be worth the sum of $2,000,000.00. It is suggested that there is a limitation through the use of the words "money's worth." We respectfully submit that this really adds nothing to the requirement of adequate and full consideration. "Money's worth" may be the performance of charitable acts just as well as the transfer of property.

The respondent argued in this and other cases that this consideration must be received by the decedent and augment his estate, though this requirement was stricken from Article 36, Regulation 70 (1929 ed), by T. D. 4322 (X-2 C. B. 420) dated September 18, 1931. We see no justification for such a construction. If Congress had intended that the consideration must actually be received by the decedent, it could easily have so provided (as it did in Section 302(i) of the 1926 Act). To so construe the section would make necessary the disallowance of accommodation endorsements and guarantees of accounts actually enforced against the executor. Such claims have been held to be deductible by the Circuit Courts of Appeals in *United States v. Mitchell*, 74 Fed. (2d) 571, and *Carney v. Benz*, 90 Fed. (2d) 747, 749. It would also eliminate most claims arising from personal services, which are allowed without question.

It has been stated by the Court of Appeals for the Second Circuit, in *Porter v. Commissioner*, 60 Fed. (2d) 673, 675, that this section is limited to financial bargains, but certainly there is nothing in the meaning of the words to require such a restriction.

The words do not mean that the consideration paid or rendered by the promisee must necessarily be such consideration as an ordinary, prudent business man would have required under

similar circumstances. There is nothing in the section about ordinary, prudent business men. A bad bargain, entered into without intention of avoiding the tax, would be just as binding and just as deductible as a good bargain. We, therefore, submit that if the decedent entered into a transaction which he regarded as binding upon himself and his estate, and in which he considered that the other party to the bargain was doing or undertaking to do something worth the money he had contracted to give, then there is full and adequate consideration, whether the consideration moves to him or not, whether other people think it is adequate or not, providing it is not done for the purpose of avoiding the estate tax.

The Board of Tax Appeals in *Wade v. Commissioner*, 21 B.T.A. 339, which was the leading case on this question until the Circuit Court of Appeals cases discussed below, held that the pledges made by Mr. Wade during his lifetime were deductible. One of these pledges was represented by a note for $20,000.00, bearing interest at five per cent, payable at any time, but in any event, upon his death. In reliance upon this promise, the pledgee, a museum, included the interest in its budget in the years preceding Mr. Wade's death. This pledge was secured in a campaign in which other persons also made pledges. The Board held that this consideration of promises by others was adequate and full consideration for money or money's worth, and allowed the pledge to be deducted as a claim.

In *Porter v. Commissioner*, 23 B.T.A. 1016, however, the Board limited the applicability of the *Wade Case* to pledges made in consideration of other pledges. In this case the decedent made a subscription to Princeton University to provide funds for the construction of a memorial window in the chapel there. A balance of $5,000.00 was still due on the pledge at his death, but the University had contracted for and commenced construction of the window prior to his death. The Board held that there was no proof of an adequate and full

value in money or money's worth and refused to allow the deduction, distinguishing the *Wade Case* on the ground that payments of money by other pledgors met this requirement. The executor also claimed this pledge was deductible as a transfer under Section 303 (a) (3), but this claim was likewise denied. The Circuit Court of Appeals for the Second Circuit affirmed the Board on the first ground and reversed it on the second. This decision is discussed below.

The United States Circuit Court of Appeals' decisions, however, have not followed this line of distinction of the Board of Tax Appeals in these two cases, and there is a square conflict of authority in their decisions.

The United States Circuit Court of Appeals for the Third Circuit has held, in two cases, that a binding pledge not made in consideration of other pledges is incurred for a full and adequate consideration in money or money's worth, and is deductible as a claim against the estate.

In *Turner v. Commissioner*, 85 Fed. (2d) 919, the decedent had pledged $1,000,000.00 to the Young Men's Christian Association for a building in Jerusalem. Two-thirds of the pledge was still owing at his death, and the Circuit Court of Appeals for the Third Circuit held this balance to be deductible as a claim against the estate. The Court stated that in its opinion the consideration connected with binding educational, charitable and religious gifts is money or money's worth, saying (p. 920):

> "Within the meaning of the statute, 'money's worth' does not mean money itself. The ultimate question on this phase of the case is what consideration may be regarded as money's worth. Must it be material, such physical things as may be bought and sold in the open market? Or, may it be religious, charitable, or educational considerations which in some cases are not only 'adequate and full,' but are precious and priceless? We

are told that 'a good name is rather to be chosen than great riches.' Consideration connected with educational, charitable, or religious gifts may not be money in a commercial sense, but it does constitute money's worth in a higher sense, just as the knowledge that others are contributing to charitable institutions constitutes adequate and full consideration for one's gift though, as a matter of fact, the giver does not receive a single material thing. *Jeptha H. Wade, Jr., et al, v. Commissioner*, 21 B.T.A. 339."

In this same Circuit, in *Commissioner v. Bryn Mawr Trust Co.*, 87 Fed. (2d) 607, this Circuit Court, with two Judges sitting who did not sit in the Turner case, held that an unpaid balance of a pledge to a University in the sum of $60,000.00 could be deducted. The Court gave careful consideration to the question as to whether the consideration was full and in money or money's worth. Its opinion on this question is as follows, (p. 609):

"It remains, however, to consider whether the consideration was full and in money or money's worth. It is an elementary rule that a legal consideration may take the former either of a benefit to the promisor or of a detriment or loss to the promisee. As Mr. Storey said in Townsley v. Sumrall, 2 Pet. 170, 182, 7 L. Ed. 386: 'Damage to the promisee, constitutes as good a consideration as benefit to the promisor.' The consideration for the decedent's pledges here involved was of this latter character. Was this consideration full and in money or money's worth? We think the answer to this question must be in the affirmative. Assuming the consideration was the expenditure by the college of funds to carry out the objects contemplated by the decedent, it is clear that it was in money or money's worth since these expenditures were in money, and it cannot be doubted that the consideration was full since all the funds subscribed and paid were so expended by the college."

On the other hand, as we have stated, the Circuit Courts for the Second and Eighth Circuits hold that similar pledges are not deductible but they are not in accord in their reasoning.

The decision in the Eighth Circuit seems to be on the ground that the consideration must move to the decedent, and that there can be no deduction unless his estate is augmented by such consideration.

In *Glaser v. Commissioner*, 69 Fed. (2d) 254 this Court denied as a deduction a pledge to a charitable institution known as "Shelter Home" in the sum of $250,000.00. The Board of Tax Appeals (27 B.T.A. 313) had already denied the deduction on the ground that there was no binding contract. The Circuit Court, however, instead of affirming the case on this ground, held that regardless whether it was binding, it could not be deducted as a claim against the estate. The Court based its opinion on a dictum of Judge Hickenlooper of the Circuit Court of Appeals for the Sixth Circuit in the case of *Latty v. Commissioner*, 62 Fed. (2d) 952, 954 to the effect that the words "contracted bona fide and for a fair consideration in money or money's worth" must be construed to evidence an intent on the part of Congress to permit the deduction of claims only to the extent that such claims were contracted for a consideration, which at the time either augmented the estate of the decedent, granted to him some right or privilege he did not possess before, or operated to discharge a then existing claim, as for breach of contract or personal injury. The Sixth Circuit Court of Appeals in deciding the present case recognizes that this was a mere dictum by Judge Hickenlooper and clearly holds that there is no requirement in the statute that the consideration must move to the decedent (R. p. 83). (92 Fed. 2nd at 670.)

The decisions in the Second Circuit, on the other hand, are on the ground that Congress intended this section to apply to financial bargains only and intended pledges to be deducted

under Section 303(a) (3). This Court admits that the consideration need not be received by the decedent.

In *Porter v. Commissioner*, 60 Fed. (2d) 673, (affirmed 288 U. S. 436 without discussing this point), this Court affirmed the Board's ruling (supra) that the pledge to Princeton University was not deductible under Section 301(a) (1) but allowed it to be deducted as a transfer. This ruling was followed in *Bretzfelder v. Commissioner*, 86 Fed. (2d) 713, and *Lockwood v. McGowan*, 87 Fed. (2d) 713, without discussing the point.

The Circuit Court of Appeals for the Sixth Circuit in the present case refuses to follow the basis of the rulings of the Circuit Courts of Appeal for the Second and Eighth Circuits in the *Porter* and *Glaser Cases*, respectively. It specifically holds that the Section is not limited to financial bargains, and that the consideration need not augment the decedent's estate. The Court admits that the obligations are binding on the estate, and are supported by consideration. It then holds that to give any meaning to the words, there must be more than merely such consideration as is sufficient in the law to support a promise; that it must be more than "fair consideration," and that the language of the 1926 Act must be given its plain and ordinary meaning. Without any further elaboration on what this plain and ordinary meaning is, it then states that, measured by the precise tests of the statute, these promised donations are but gifts, and there is no full and adequate consideration in money's worth. On the other hand, the Court affirmed the Board of Tax Appeals ruling allowing as deductions other pledges contingent upon similar sums being contributed by others. (R. p. 81; 92 Fed. (2d) at 669, 670.) The effect of its decision is to return to the distinction laid down by the Board in the *Porter Case* (Supra, p. 18).

Whether or not Mrs. Taft intended this fund as a gift to the University is immaterial. The law of Ohio holds that promised donations of this sort are legally binding obligations.

By calling them gifts, the Court has really attempted to avoid the question in dispute, and is inconsistent with its earlier finding that there was consideration. We submit that the analysis of these words which we give at the beginning of this argument shows that this consideration does come within the plain and ordinary meaning of the words; and that the ruling of the Third Circuit in the *Turner* and *Bryn Mawr Cases* should be sustained in the present case.

B. The execution of this binding pledge was a transfer to a charitable corporation deductible under Section 303(a) (3) of the Revenue Act of 1926.

Section 303(a) (3) of the Revenue Act of 1926 permits the deduction of transfers to charitable and educational corporations, as well as bequests, legacies, and devises to such corporations. It is respectfully submitted that the act of entering into a binding contract to pay money is a "transfer" within the meaning of the estate tax act. It is admitted that the University of Cincinnati would fall within the terms of the deductions allowed, if this had been a bequest to the University. Of course, in the ordinary case the question does not arise, whether the entering into an obligation before death, to be executed after death, is a transfer, because whether it is or not, the obligation itself can be deducted. The word "transfer" is frequently used throughout the estate tax law, and in many cases it includes, besides an actual transfer of physical possession prior to death, the execution of a document such as a trust deed or contract to complete the actual transfer at a later date, perhaps subsequent to death. The word "transfer" certainly includes the execution of a declaration of trust retaining a life interest in the donor, the transfer to be completed at his death.

Congress and the Commissioner of Internal Revenue have both attempted to give to the word "transfer" as broad a meaning as possible; certainly it should include the execution

of a binding agreement to pay money, which the executor must carry out under the laws of the state where made. If, for instance, a man approaching death contracted with a jeweler to buy and have delivered to his wife an expensive piece of jewelry and then died before the bill was paid or the jewelry delivered, the Government would have to allow the deduction of the debt to the jeweler but it would certainly and rightfully claim that there was a transfer in contemplation of death, although the only act of the decedent was the entering into a contract with the jeweler. The effect of the contract was to decrease the net estate of the testator, and it has all the characteristics of a transfer. Transfers may be made in many direct and indirect ways, but if the general effect is to decrease the decedent's estate, the transaction falls within the usual definition of a "transfer." The transfer of money to charitable institutions whether prior to death or by will is expressly deductible.

This contention is, as we have already pointed out, fully supported by *Porter v. Commissioner*, 60 Fed. (2d) 673, the case of the pledge of the memorial window to Princeton University. The decision of the Circuit Court of Appeals for the Second Circuit in that case was affirmed by the Supreme Court (288 U. S. 436) without, however, discussing the question of the deductibility of the pledge.

The later *Bretzfelder* and *Lockwood Cases* approve the *Porter Case*, although in the *Bretzfelder Case* the Court refused to allow the pledge to be deducted as a transfer because there was no proof that the pledgees were charitable corporations within the meaning of the statute.

In *Turner v. Commissioner*, 85 Fed. (2d) 919, the Circuit Court of Appeals for the Third Circuit sustained the deductibility of a pledge on the alternative ground that it was a transfer. There were two dissents to the majority opinion of the Board of Tax Appeals (31 B.T.A. 446) in this case which were in part on the ground that the pledge in question was covered by the word "transfer" in Section 303(a) (3).

In the case of *Commissioner v. Bryn Mawr Trust Co.*, 87 Fed. (2d) 607, this same Court also considered the question whether a pledge to St. Joseph's College was a transfer, and while reaching no definite conclusion because it was unnecessary, the Court stated that it knew of no reason why the rule of the *Porter* and *Turner Cases* was not applicable.

The only Circuit Court case aside from the present case that has refused to allow the deduction of such pledges as transfers is the *Glaser Case* in the Eighth Circuit. While the Court in that case (69 Fed. 2d at p. 256 bottom) seemed to feel that the Second Circuit had not considered the question very fully, its holding was merely that the claimed obligation in that case could not by any reasonable persuasion be brought within Section 303(a) (3). This ruling was correct because the promise to provide funds for the Shelter Home was certainly not binding on the pledgor. All that the pledgor had done was to leave a memorandum that he intended to change his will. The Board of Tax Appeals (27 B.T.A. 313) had held the claim not deductible on the same ground.

The Circuit Court of Appeals for the Sixth Circuit in the present case, in holding that Mrs. Taft's agreement to transfer this fund to the University did not amount to a transfer under Section 303(a) (3), finds help in the fact that the 1918 Act in the same environment used the word "gifts," while the 1926 Act used the word "transfers" (R. p. 82). It seems to us that this change strengthens our case rather than weakens it, "transfers" is certainly a broader word than "gifts." We agree that no gift had taken place prior to Mrs. Taft's death, but a valuable right enforceable against her and her estate had certainly been transferred. We are not attempting, as suggested by the Court, to use any doctrine of relation back. This transfer took place at the time the University accepted the offer.

The contract here under consideration, made by Mrs. Taft with the University, was binding, and incurred bona fide and for an adequate and full consideration in money or money's

worth. We respectfully submit, therefore, that it created in the University a claim against the estate, which was properly deductible under Section 303(a) (1), and also that the creation of this legal obligation against Mrs. Taft, also binding on the estate, was a transfer which was properly deductible under Section 303(a) (3).

II

Additional reasons why the other obligations are deductible as claims against the estate, not applicable to the indebtedness to the University for the Charles Phelps Taft Memorial Fund.

The other three obligations, namely, the agreement to pay $10,000.00 toward the salary of a director of art, the agreement to pay the salaries of two musicians, and the agreement to pay the salary of Mr. Kelley, are likewise deductible as claims for an adequate and full consideration in money or money's worth, or as transfers to charitable corporations for the same reasons as are set forth above. There are also additional reasons why these obligations are deductible as claims under Section 303(a) (1) which are not applicable to the agreement to establish the Charles Phelps Taft Memorial Fund.

In each of these cases the charitable corporation as consideration for the payment, agreed to employ men at salaries equivalent to the amounts which Mrs. Taft offered to pay, to do things which she desired to be done. In none of these cases would the charitable corporation have employed the men except for Mrs. Taft's promise, although in the case of the agreement to provide Mr. Kelly's salary, the Board found (R. p. 31) that it did not appear that Mr. Kelly's employment was in consideration of the decedent's promise. We assigned this finding as error in the petition for review to the Circuit Court, and also assigned this finding as error in this brief. Mr. Herbert G. French, a Director of the University, testified that the Uni-

versity would not have employed Mr. Kelly if Mrs. Taft had not agreed to pay his salary (R. p. 53, last paragraph), and there is no testimony to the contrary whatsoever.

If Mrs. Taft had made a direct agreement with these men to pay their salaries in return for this work which she desired them to do, there would have been no question but the amount would have been deductible. It seems to us that the mere fact that the charitable corporations were to employ them, and were also benefited by their services, does not change the situation.

Both the Board of Tax Appeals and the United States Circuit Court of Appeals denied these claims on the ground that they were not made in consideration of money promises of others within the ruling of the *Wade Case*, but it seems to us that they are in fact stronger cases for allowing the claim than the case of pledges in reliance on other pledges, which were approved by the Board of Tax Appeals in the *Wade Case* and by the United States Circuit Court of Appeals in the case of *Commissioner v. Taft, Executor*, (R. 82; 92 Fed. (2d) at 670) heard by the Circuit Court at the same time that the present case was heard, and which is covered by the same opinion. The charitable corporation was required to pay out money for services which were clearly adequate and full consideration in money or money's worth, besides the fact that Mrs. Taft was having things done which she desired to be done.

CONCLUSION

We, therefore, respectfully submit that the petition for certiorari should be granted, because the case is one of great public and general interest, in which the lower courts of the United States are in conflict; and that the conflict of authority which exists should be resolved in favor of the Petitioner.

Respectfully submitted,

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APPENDIX

Section 7916 of the Ohio General Code, reads as follows:

"For the further endowment, maintenance and aid of any such university, college or institution heretofore or hereafter founded, the board of directors thereof, in the name and in behalf of such municipal corporation may accept and take as trustee and in trust for the purposes aforesaid any estate, property or funds which may have been or may be lawfully transferred to the municipal corporation for such use by any person, persons or body corporate having them, or any annuity or endowment in the nature of income which may be covenanted or pledged to the municipal corporation, towards such use by any person, persons or body corporate. Any person, persons or body corporate having and holding any estate, property or funds in trust or applicable for the promotion of education, or the advancement of any of the arts or sciences, may convey, assign and deliver these to such municipal corporation as trustee in his, their or its place, or covenant or pledge its income or any part thereof to it. Such estate, property, funds or income shall be held and applied by such municipal corporation in trust for the further endowment, maintenance and aid of such university, college or institution, in accordance nevertheless with the terms and true intent of any trust or condition upon which they originally were given or held."